**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO. 895 OF 2005**

Vilson Shyam Medhe ... Appellant

V/s

Smt. Nalini Madhukar Mohite & ors. ... Respondents

Mr. A.D. Avhad for the appellant.

Mr. M.M. Sathaye for the respondent No.1.

**CORAM: P.V. KAKADE, J.**

**DATED: 19TH SEPT., 2005**

**P.C.:**

1. The appellant has preferred this appeal against the judgment and order passed by the Addl. District Judge, Nashik allowing the appeal and decreeing the plaintiff's suit for removal of defendant's unauthorized construction in front of house of the plaintiff within three months and setting aside the order passed by the Civil Judge, J.D., Nashik dismissing the plaintiff's suit.

2. I have heard the learned counsel for both parties. Perused the record.

3. The plaintiff filed the suit for perpetual and mandatory injunction against the defendants on the ground that the defendants had unauthorisedly constructed suit rooms in the property leased to the plaintiff by his landlord. It is an admitted position that City Survey No.6933 includes suit property owned by diaosation coulee Nashik Trust. Parties to the suit also are not disputing that the suit property is let out by rent by the said Trust to them. It is also not in dispute that defendant No.1's wife Agnes Wilson is real sister of plaintiff's husband deceased Madhukar Mohite. The plaintiff has alleged that she is tenant of the said Trust in the suit property and in lawful possession thereof. Defendant No.1 is her tenant since 1995 in one constructed building admeasuring 45 ft. x 20 ft. and defendant No.1 had unlawfully started construction in the area of 25 ft. x 20 ft. in front of that property of the plaintiff. Hence suit was filed and relief for perpetual and mandatory injunction was sought for.

Defendants contested the suit inter-alia denying all the allegations made by the plaintiff and on various other grounds sought dismissal of the suit.

4. The learned Trial Judge adjudicated the dispute on merits and came to the conclusion that the plaintiff had proved that she was in lawful possession of the property and defendant No.1 was her legal tenant in area admeasuring 45 ft. x 20 ft. It was also held that the plaintiff failed to prove that the defendants had made unauthorized construction to the extent of 25 ft. x 20 ft. in front of the property in possession of the plaintiff and, as such, the suit came to be dismissed.

5. The learned Addl. District Judge, after hearing both sides, came to the conclusion that the plaintiff was a tenant in the suit property and defendant No.1 had constructed a room of 25 ft. x 20 ft. open space unauthorisedly and, therefore, plaintiff was entitled for perpetual and mandatory injunction and, as such, the suit came to be decreed.

6. At the outset, it may be noted that there is absolutely no substantial question of law involved in this appeal. The learned counsel for the appellant vehemently urged that there was no documentary evidence produced by the plaintiff to show that the construction made by the defendants was unauthorized and mere oral evidence to that extent was not sufficient to grant

decree in the suit. However, the lower appellate Court is seen to have properly appreciated the oral as well as documentary evidence on record in order to hold that the plaintiff had led sufficient evidence in order to show that the construction of room during pendency of the suit was made by the defendants for which purpose PW-2 and PW-3 were held to be reliable. On the other hand, when it was an admitted position that the defendants had made construction on the suit property, it was the duty of the defendants to show that they had sought either Municipal permission or permission of the landlord Trust in this regard. It was urged on behalf of the appellant that construction was made prior to so many years and, therefore, suit is also barred by limitation. However, unless and until it is established that the suit transaction was made in a particular year, it cannot be held that the suit for removal of the said construction is time barred and this is especially so when the defendants have admitted that they have made construction, it was their duty to bring on record the evidence in order to show that it was authorized construction. In absence of this, the learned lower appellate Court has rightly shifted the burden on the defendants and it was held that plaintiff’s available evidence was sufficient to pass decree against the

defendants.

7. In view of this position, the appeal is devoid of any merits and stands dismissed with no order as to costs.

Consequently, Civil Application No.1437 of 2005 also stands dismissed with no order as to costs.

8. At this stage, the learned counsel for the appellant seeks stay of this order. In view of the facts and circumstances, the order stands stayed for a period of six weeks from the date of this order.

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